

JAMHABRO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ROBYN ABRAHAM,

Plaintiff,

v.

17 Civ. 5429 (KPF)

ABBY LEIGH, et al.,

Oral Argument

Defendants.

-----x

New York, N.Y.
October 22, 2019
3:30 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

LAW OFFICES OF COLLEEN KERWICK

Attorney for Plaintiff

BY: COLLEEN MARY NI CHAIRMHAIC

COZEN O'CONNOR

Attorneys for Defendant Estate of Mitch Leigh

BY: MICHAEL JOHN BROADBENT

H. ROBERT FIEBACH

Also present: Ira Sacks, Esq.

Anna Hanke, Esq.

JAMHABRO

(Case called)

MS. CHAIRMHAIC: Colleen Chairmhaic, counsel for Robyn Abraham.

THE COURT: Good afternoon, Ms. Chairmhaic.
And good afternoon to you as well.

MS. ABRAHAM: I'm Robyn Abraham.

THE COURT: Yes, thank you.

MR. FIEBACH: Good afternoon, your Honor. Robert Fiebach for the Estate of Mitch Leigh, and to my right is Mr. Broadbent that you know. Also observing from our firm is Anna Hanke who's sitting right there.

THE COURT: She is welcome. Thank you very much.

Mr. Sacks, you don't mind if I say I'm surprised to see you here.

MR. SACKS: I wouldn't miss it for anything, your Honor.

THE COURT: All right. May I inquire, sir, you don't today have a horse in this race, is that not correct?

MR. SACKS: That is correct, your Honor.

THE COURT: But you're here as an observer, and I can't exclude you, so it's fine. You're here.

There are some matters I want to address, preliminary matters that I want to ask some questions of the parties, please.

Ms. Chairmhaic, since last you and I have seen each

JAMHABRO

1 other, there were several rounds of emails and at least one
2 telephonic discussion. I am understanding that because you are
3 here standing with Ms. Abraham, the representation issues that
4 have been addressed in some of our prior proceedings have been
5 resolved. Am I correct?

6 MS. CHAIRMHAIC: The representation has been resolved
7 in accordance with the October 7, 2019, agreement.

8 THE COURT: Let me be, please, more precise. Right
9 now, today, for purposes of this motion, you represent
10 Ms. Abraham?

11 MS. CHAIRMHAIC: Correct. I'm representing Robyn for
12 this motion and for the two bundled depositions coming up next
13 week, as I indicated to her I would, so as to make the
14 transition to new trial counsel easier.

15 THE COURT: Should I be anticipating a transition to
16 new trial counsel, or is that something still under discussion?

17 MS. CHAIRMHAIC: We're hopeful that that will happen
18 once the motion for sanctions is resolved.

19 THE COURT: You and the Wiss firm --

20 MS. CHAIRMHAIC: Correct.

21 THE COURT: -- filed a joint motion to enforce the
22 settlement. I'm understanding by your being here that that
23 motion is now withdrawn because the matter is, in fact,
24 settled, and pursuant to my understanding of that settlement, I
25 permitted the disbursal of certain funds. Am I correct?

JAMHABRO

1 MS. CHAIRMHAIC: Wiss & Partners would like the
2 settlement agreement to be enforced as a court order.

3 THE COURT: So the motion is still out there?

4 MS. CHAIRMHAIC: The motion -- my understanding is
5 that the motion is resolved and, it would be hoped, by
6 stipulated judgment.

7 THE COURT: Is there a form order that I should be
8 expecting from Wiss & Partners or a stipulation that I should
9 be expecting from all of the parties on the plaintiff's table?

10 MS. CHAIRMHAIC: With your guidance, we would be happy
11 to provide that to you, but it is the wish of Wiss & Partners
12 that the settlement agreement be enforced as a court order --

13 THE COURT: When you say --

14 MS. CHAIRMHAIC: -- as the skeletal terms of it.

15 THE COURT: The skeletal terms only?

16 MS. CHAIRMHAIC: Yes.

17 THE COURT: May I address your client directly?

18 MS. CHAIRMHAIC: Yes.

19 THE COURT: Ms. Abraham, you've heard me speak for a
20 moment or two with Ms. Chairmhaic about the motion to enforce
21 the settlement agreement. What is your understanding of the
22 resolution of that motion?

23 MS. ABRAHAM: As represented to your Honor on
24 October 7 when we were all together, that I concur with
25 Ms. Chairmhaic with regard to the points and that nothing has

JAMHABRO

1 changed since October 7 other than presentation by Wiss &
2 Partners of an eight-page agreement which was overly broad and
3 burdensome which I did not agree to. So since then we have
4 agreed to enforce exactly what we had represented to this Court
5 on October 7, which is the oral settlement agreement.

6 THE COURT: You'll recall that on October 7 you all
7 studiously avoided putting that on the record. Ms. Chairmhaic,
8 in a letter to me as part of the motion to enforce the
9 settlement, gave a bullet point list of terms. Do you recall
10 seeing that document?

11 MS. ABRAHAM: Among many, many others vaguely. So I
12 don't remember it in full, but I do remember what we discussed
13 in the jury room, and the contents of that were accurate. So
14 assuming that is the same document as represented to the Court,
15 I do concur, as represented to the Court on October 7, were
16 those terms.

17 THE COURT: All right. So if I were to endorse the
18 bullet points that are contained in Ms. Chairmhaic's submission
19 to me, will that suffice?

20 MS. ABRAHAM: I'd like to just be able to look at it
21 again, if that would be OK, maybe by the end of this hearing or
22 here in court. I don't recall the full contents, but I have a
23 pretty good memory, so I'm assuming it is what we talked about,
24 which was accurate to the best of my knowledge.

25 THE COURT: Then on the broader issue of

JAMHABRO

1 representation today, Ms. Chairmhaic is your counsel for
2 purposes of this proceeding?

3 MS. ABRAHAM: Yes, your Honor.

4 THE COURT: I do understand that. I'll let you sit
5 down, please.

6 Ms. Chairmhaic, a second question for you. I don't
7 know that your opposition papers go into great depth regarding
8 the standards for the imposition of sanctions. I recognize
9 that you disagreed with a number of the factual assertions and
10 with some of the arguments made. Do you disagree with the
11 recitation of the standards for the imposition of sanctions in
12 Mr. Sacks' submission, submissions, because there are two, and
13 then later in the lead defendant's submissions?

14 MS. CHAIRMHAIC: Which disagree that the facts present
15 cause for sanctions in this case?

16 THE COURT: Ms. Chairmhaic, let me be more pointed,
17 then. What I'm really getting at is the following: If it
18 turns out that today I'm rendering an oral decision in the
19 issue, it would be my preference not to recite into the record
20 the cases for the proposition of sanctions under my inherent
21 powers, sanctions under Rule 37, sanctions for spoliation,
22 because, as recited by Mr. Sacks and then later by the Cozen
23 O'Connor firm, I don't believe that the recitation of the legal
24 standards is in error. Did you take issue with any of the
25 legal standards that were cited to me?

JAMHABRO

1 MS. CHAIRMHAIC: It was, again, our hope that it
2 wouldn't get to the point of sanctions because -- and I have
3 spoken to Arnold & Porter about that too, and they had
4 concurred that they did not believe that there were -- that
5 Robyn had doctored emails.

6 THE COURT: I don't think you're --

7 MS. CHAIRMHAIC: I do hear what you're saying with
8 regards to their legal analysis with regards to sanctions.

9 THE COURT: Ms. Chairmhaic, I have to give a legal
10 standard where I find, ultimately, that they're warranted or
11 not warranted. I just want the law to be correct. I believe
12 that the law as presented to me by Mr. Sacks and by the lead
13 defendants is correct. I don't believe that you went into
14 great detail on the legal issues --

15 MS. CHAIRMHAIC: Right.

16 THE COURT: -- preferring instead to focus on the
17 factual. I assume, therefore, that you didn't think they had
18 misstated the law on sanctions. You simply believed that even
19 with that law correctly presented, your client's conduct,
20 whatever it is, did not amount to meriting sanctions. Am I
21 correct?

22 MS. CHAIRMHAIC: Correct.

23 THE COURT: As a result, at some point when I decide,
24 because I do have to decide this motion, do I need to recite
25 into the record the standards for the imposition of sanctions,

JAMHABRO

1 or can we agree that the standards that were presented were
2 correct and our fight, your fight, with the folks at the back
3 table is as to whether the conduct suffices?

4 MS. CHAIRMHAIC: That is correct.

5 THE COURT: OK. That was what I was trying to get at.
6 I wasn't trying to trick you in any way. For some people it
7 can be very distracting to the point of being boring to have
8 case cites thrown at them, and so I didn't want to do that if
9 you all were sort of agreeing as to what the ground rules were.

10 All right. I'm going to ask you to sit down for just
11 a moment, please. Thank you.

12 MS. CHAIRMHAIC: Thank you.

13 THE COURT: There are two other -- actually, which of
14 Mr. Fiebach or Mr. Broadbent should I be directing my questions
15 to?

16 MR. FIEBACH: The sanctions hearing, Mr. Broadbent,
17 your Honor.

18 THE COURT: Thank you.

19 I'll ask both of you, and one of you is going to give
20 me an answer. You've just heard me discuss with
21 plaintiff's counsel the need or advisability of reading into
22 the record the legal standards for sanctions. Again, it is my
23 preference not to do so unless someone wants me to. I have
24 them here. It's just, to me, boring. So do you have a
25 thought, sir?

JAMHABRO

1 MR. BROADBENT: I don't need your Honor to read them
2 into the record, no.

3 THE COURT: All right. I'm assuming you didn't
4 disagree with what Mr. Sacks initially laid out as the
5 standards that governed my conduct?

6 MR. BROADBENT: I believe we, in fact, agreed. So --

7 THE COURT: So there. Then I'm not going to be
8 reading them. Thank you very much.

9 Just a couple of prefatory comments before I begin
10 asking the questions that I have. Number one, I see no need
11 and, therefore, my decision today will not in any way address
12 or touch on matters that may or may not have happened in
13 Florida years ago or lawsuits that may or may not have been
14 filed against the law firms involved in this case or other
15 litigation that may have taken place. It just doesn't, to me,
16 seem to matter, prior litigation.

17 Do you believe it does, Ms. Chairmhaic?

18 MS. CHAIRMHAIC: Yes, we do.

19 THE COURT: Why?

20 MS. CHAIRMHAIC: We believe that the etiology of the
21 motion for sanctions was that there was an unequivocal breach
22 of contract and they were looking for a defense. During
23 discovery, Ms. Abraham's maiden name became known, and it was
24 googled. It came up with information about her past history
25 from 30 years ago, and we believe that that served as a seed

JAMHABRO

1 for which this motion for sanction was grown from. I believe
2 that she endured a huge tragedy 30 years ago. It was defenses
3 to domestic violence and child sex abuse that were created by a
4 man called Dr. Richard Gardner. Robyn was part of that
5 epidemic. His theories of Munchausen syndrome by proxy never
6 made it into the DSM, but it did make it into the family courts
7 at that time.

8 Robyn fought that, and she was one of many, many, many
9 mothers at that time who were discredited for reporting
10 domestic violence and child sex abuse. They were called a liar
11 if they had no proof. If they had evidence, they were called
12 fabricators. If they persisted, they were called crazy. His
13 theories never made it into the DSM. She fought the system
14 and, just like with many other people who fought the system,
15 she got sucked into it, and she got hurt. That became very
16 public, and we do believe that the disclosure of that cast the
17 seed for two law firms and six attorneys to create this defense
18 coined in that she had somehow doctored and fabricated emails,
19 which we don't believe that she did.

20 THE COURT: But as distinguished from a situation
21 where they simply are seeing emails with different words and
22 are trying to figure out how it is that they can coexist, you
23 want me to find that all of this began because they were
24 worried about this litigation and they therefore seized on this
25 thing from 30 years ago and, what, made up everything since?

JAMHABRO

1 MS. CHAIRMHAIC: I believe that it gave them the
2 defense that she had previously been accused of fabricating in
3 a domestic violence/child sex abuse case, which time has proven
4 her to be correct, her assertions --

5 THE COURT: OK. One thing you really do have to learn
6 is that you really do have to stop interrupting me and cutting
7 me off. That's not going to work today.

8 But my point is this: I would have thought that you
9 wouldn't want me to consider those findings of 30 years ago at
10 all and to just put them out of my mind and to go about with
11 what I have today from the parties that I have seen in the
12 litigation before me firsthand, but no, you actually do want me
13 to think about it. You don't want me to think about the
14 findings of incredibility that were made 30 years ago. You
15 simply want me to take note of this litigation as a seedbed for
16 the allegations that are presently before me?

17 MS. CHAIRMHAIC: Correct. We would like you to take
18 note of the litigations from 30 years as a seedbed, but not --
19 the findings in those were since superseded by her immigration
20 papers in London which said that she, obviously, has no mental
21 illness or incapacity in any way, shape, or form which goes
22 counter to what was decided 30 years ago.

23 THE COURT: Yet I don't understand that there's been
24 any effort to rescind those prior decisions or those prior
25 findings. Has there been? Has there been a successful one?

JAMHABRO

1 Because what you're asking me to do is pick and choose. So I'm
2 supposed to look at these things for which I have no firsthand
3 knowledge and to say they were lying when they made these
4 findings about her, but those lies precipitated the very
5 sanctions motions that we have now.

6 MS. CHAIRMHAIC: We're happy to brief that.

7 THE COURT: No, we're not going to brief anything.
8 You've done enough briefing in this case. I asked a question,
9 and you gave me the answer. The answer is you want me to
10 consider the litigation of 30 years ago. I didn't think you
11 did, but now I know that you do, and that's fine.

12 I'm also just going to note, though, at times your
13 opposition papers were over the top, and the "Star Wars"
14 reference -- "Star Wars"/"South Park" reference, completely
15 unwarranted. There were statements I thought were based more
16 in passion than in law. So I've read it and I have the ability
17 to read things without getting inflamed by statements that are
18 made therein, but I just want you to understand, should there
19 be future submissions before me, that this one was over the
20 top.

21 With that, let me turn to the questions that I have.
22 I want to understand, in the first instance, why -- well, make
23 sure I understand, with respect to these emails, why it is they
24 exist only in the PDF format. It is my understanding that
25 these emails, certain emails, were saved in PDF format or

JAMHABRO

1 printed and then scanned and sent to prior counsel at the
2 Schillings firm. Am I correct?

3 MS. CHAIRMHAIC: Correct. There were some emails that
4 were printed to PDF and sent to Rachel Atkins and preserved in
5 the format that they were received since. They were also
6 forwarded to Arnold & Porter. My understanding, from speaking
7 with Rachel Atkins, was that Robyn sends a lot of emails.
8 Instead of forwarding them all to her, Rachel asked her to give
9 her a package, and then Robyn put together the package instead
10 of receiving thousands of emails from her.

11 THE COURT: But not all of the emails that were put
12 into PDF form exist only as PDFs. We're not here for thousands
13 of emails. There were 33 called to my attention, correct?

14 MS. CHAIRMHAIC: Correct.

15 THE COURT: And it is not the case that transforming
16 or printing an email into a PDF format destroys the native
17 format of the email, am I correct?

18 MS. CHAIRMHAIC: Correct.

19 THE COURT: So one reason proffered for why these
20 emails do not exist in native format is because they were
21 both -- both email accounts -- well, one is HB Global and the
22 other is INTCAPSOL, International Capital Solutions? I don't
23 know what it is. But anyway, those two accounts, they were
24 both maintained by the GoDaddy Internet service provider or
25 email supporter, is that correct?

JAMHABRO

1 MS. CHAIRMHAIC: Correct, they were on the GoDaddy
2 platform.

3 THE COURT: Thank you. That's a better way of
4 putting it.

5 So what I was told first by the Arnold & Porter firm,
6 and I believe that you are repeating it, is that there was
7 something that happened on the GoDaddy platform that caused
8 certain emails to be lost in their native format. Is that
9 correct?

10 MS. CHAIRMHAIC: I believe that Robyn was not sure
11 what happened to the emails, and she gave multiple explanations
12 for what could have happened. They could have archived some
13 and deleted them by accident. They could have been recalled.

14 THE COURT: No, no, stop again. The first thing I was
15 told by the Arnold & Porter firm, and in fact the only thing I
16 was told by the Arnold & Porter firm, was that there was a
17 problem with the GoDaddy platform that caused Ms. Abraham to
18 lose certain emails. Is that not correct?

19 MS. CHAIRMHAIC: I did call and speak with the GoDaddy
20 people on the phone along with Robyn and Larry Daniel, and they
21 said that they have lots of server crashes every day, but they
22 only keep records of them for two weeks. So they wouldn't be
23 able to give us any more information five years afterwards.
24 They keep records of their crashes two weeks only.

25 THE COURT: I don't think you're answering my

JAMHABRO

1 question. My question was, was it not the case that Arnold &
2 Porter told me that the only reason was something wrong with
3 the GoDaddy platform?

4 MS. CHAIRMHAIC: I read the transcript before your
5 Honor, and I did read that Susan Shin had made that
6 representation to the Court.

7 THE COURT: OK. The question you did answer, which I
8 did not yet ask, was that I can harmonize that with the
9 defense's subpoena to GoDaddy which recites no outages in these
10 particular pods where information is stored because you were
11 told by someone else that there are, in fact, daily outages at
12 GoDaddy. Is that what you were told?

13 MS. CHAIRMHAIC: What was represented to me in a phone
14 call I was joined into --

15 THE COURT: And that's where in my record?

16 MS. CHAIRMHAIC: I believe that it's in the affidavit
17 from Larry Daniel.

18 THE COURT: All right. Please continue.

19 MS. CHAIRMHAIC: It's my understanding that they do
20 have outages. They just don't keep records of them because
21 they have outages and they have a lot of them every two weeks,
22 and then they don't keep anything after two weeks. So going to
23 subpoena something from five years ago, it's going to return
24 with no records. That was my understanding pursuant to a
25 teleconference I was joined into, and I believe that Larry

JAMHABRO

1 Daniels was on that call too. He's the expert, so it's in his
2 affidavit.

3 THE COURT: Of course. Let me please take a moment to
4 look at that. Thank you.

5 That's not entirely what he says. On the paragraph
6 that spans pages 1 to 2, what he says is that each server and
7 email provider may handle hundreds of thousands or millions of
8 email messages in a single day. The log file's saved to track
9 what happened with these messages or specific archive messages
10 can be hundreds of megabytes or even gigabytes for each day.
11 As email providers only keep their logs for a short period of
12 time, for example, two weeks, there would be no way to retrieve
13 a backup of these emails from four years ago.

14 That doesn't say that there are daily crashes and
15 outages that would cause people to lose emails and that there's
16 no way of GoDaddy keeping track of them. So if there's another
17 place in his affidavit that you want me to be directed to,
18 please let me know.

19 MS. CHAIRMHAIC: OK. I believe that that's what I was
20 referring to, what ended up in his report. And also on
21 page 16, footnote 1 of my opposition to Robyn's memorandum of
22 law and opposition to defendant Wasserman's and Honig's motion
23 for sanctions, it's referenced there again.

24 THE COURT: Yes, although that's your recitation, and
25 I have no one from GoDaddy telling me that.

JAMHABRO

1 MS. CHAIRMHAIC: Right.

2 THE COURT: But then things changed because then I
3 understood that the issue was one of the computer being broken.
4 I understood it was damaged in transit, but the references to
5 what was damaged speak to the case of the computer, the screen,
6 the DVD drive, things of that nature. I did not see that the
7 hard drive was irretrievably damaged and even Mr. Bardfield's
8 evidence that was submitted to me dated July 24, and somehow
9 notarized July 29, but we'll leave that to the side, that also
10 doesn't say that the hard drive was damaged beyond repair.
11 There are references in his invoice to data retrieval without
12 telling me that there was no data to retrieve.

13 I'm not sure how I can accept this as a statement that
14 one would be unable to retrieve from the hard drive these
15 messages. Secondly, I'm not sure how it matters because if
16 GoDaddy didn't keep them because of outages, why would it
17 matter what was on her hard drive?

18 MS. CHAIRMHAIC: In order to do a forensic examination
19 of her computer to try to track potentially deleted emails,
20 they would need to have the data from her computer, and Larry
21 Daniel did also ask for the computer which she had operated on
22 for that purpose. So we called Steven Bardfield, and he had
23 said that there was a Sony VAIO computer that was damaged in
24 transit, either dropped in airport baggage or something of that
25 format, and we saw the invoice that there was data retrieval

JAMHABRO

1 done on that computer, and it was the casing that had been
2 damaged. I asked Steven Bardfield if he retrieved the data
3 from it, and he said there were two or three computers that he
4 had worked on for Robyn, and he was not sure at that time. But
5 we were unable to get the computer or the hard drive from that
6 computer in order to be able to give it to Larry Daniel to do
7 his forensic investigation.

8 THE COURT: What is your position with respect to
9 Ms. Abraham's obligation to retain materials that were of
10 interest to this litigation? Because I thought I understood
11 from the opposition, and I'm sure I was misunderstanding this,
12 that there was a suggestion that the litigation hold only went
13 one way. That defendants, by July of 2014, should have done
14 something to maintain all of their emails, but that she didn't
15 have a corresponding obligation. Is that what you're arguing?

16 MS. CHAIRMHAIC: No.

17 THE COURT: OK.

18 MS. CHAIRMHAIC: I do believe that she had an
19 obligation to retain everything. She was, obviously, on notice
20 that there was going to be a lawsuit, considering she brought
21 it.

22 THE COURT: Yes.

23 MS. CHAIRMHAIC: And that was why one of our
24 recommendations was that she accept responsibility for not
25 maintaining the hard drive, not maintaining -- the lawsuit was

JAMHABRO

1 brought in 2017, and the hard drive was gone in 2014.

2 THE COURT: Yes, but the Schillings demand letter was
3 in 2014 --

4 MS. CHAIRMHAIC: Yes, exactly.

5 THE COURT: -- which I know you know.

6 MS. CHAIRMHAIC: She was on notice that she was going
7 to be bringing a lawsuit for breach of contract if it could not
8 be resolved due to financial losses of making a -- of
9 performing under this contract and not getting paid. She did
10 give her computer for parts, which we believed was a mistake on
11 her part. It certainly hurt her case and brings us here to
12 this motion for sanctions.

13 So it was my recommendation to Robyn when we went
14 through the file just -- you can't authenticate these emails
15 because you didn't save your computer. Accept responsibility
16 for that and make out your case in another way. That's why she
17 did accept responsibility for that, and we did say to the Court
18 that she would be willing to have those emails precluded and
19 not use them in the trial of this action in her case against
20 defendant Leigh.

21 THE COURT: Of course. But by destroying the hard
22 drive, she also destroys the chance of the defense to see if
23 there was anything on her hard drive that would be useful to
24 them. I believe that's what they've identified to me as the
25 problem.

JAMHABRO

1 You'll please understand that one of the things that
2 causes me concern, and it may be because theories evolve or new
3 counsel get involved, but it's troublesome to me that the
4 reasons given for why these emails don't exist keep changing,
5 because I've gone through several already. First it was blame
6 GoDaddy, and I don't really have a great substantiation for
7 that argument. Then it was blame the airline, but of course
8 we'll never know because we have no idea of what was saved, and
9 he couldn't tell us today. I appreciate Mr. Bardfield's candor
10 in that regard. Then it was an argument that Ms. Abraham has
11 an accretive method of sending emails where she'll send many,
12 many emails during the day, and if she doesn't get a response,
13 she may modify her emails as she sends them so that perhaps
14 there could be a one-sentence first email and later on there's
15 a second email with an additional sentence or a modified
16 sentence, and then if still not a reply, moving on to something
17 else. Or I think a variation of this would be that she would
18 sometimes by mistake, just given the sheer number of emails,
19 send draft emails and then sends a final email later on.
20 That's another explanation, correct?

21 I'm calling it an accretive process. Maybe you have a
22 different name for it.

23 MS. CHAIRMHAIC: My understanding is that there are
24 anomalies in the emails, and she couldn't find the live
25 versions of the emails. And she's been trying to figure out

JAMHABRO

1 what happened, and she's coming up with all sorts of potential
2 reasons because she doesn't know what happened.

3 THE COURT: OK.

4 MS. CHAIRMHAIC: So these are potential
5 justifications: Well, maybe I archived them and maybe I
6 deleted that folder, or maybe somebody recalled them or
7 maybe -- like, if you didn't do it, you're not going to know.

8 THE COURT: Of course, but Ms. Chairmhaic, we're in
9 the middle of a sanctions hearing.

10 MS. CHAIRMHAIC: Correct.

11 THE COURT: I don't really want speculation, and it's
12 a little rich to have these sort of spitballing discussions
13 while she's saying that Mr. Nguyen's affidavit is nothing but
14 speculation.

15 If you're telling me that I should find that the
16 anomalies, as you've described them, can be explained by her
17 idiosyncratic email-sending practices, I want to know. I want
18 to know that that is an argument that you are making so that I
19 can explore it with you. If you're saying that it is a theory
20 that we have since shot down as we've looked at the evidence
21 and compared it, I want to know that as well.

22 MS. CHAIRMHAIC: I can absolutely say, as an officer
23 of the court, that I am very familiar with Robyn Abraham's
24 email practices, more familiar than I would like to be.

25 THE COURT: I know you know.

JAMHABRO

1 MS. CHAIRMHAIC: And she absolutely sends a huge
2 amount of emails which all say the same thing. Sometimes she
3 will have one or two sentences in those emails differently.
4 She has sent me once 89 emails in one day.

5 THE COURT: Yes, I'm aware of the day. But the issue
6 is when she's sending you those emails, are you responding?
7 Are these email chains that are being sent to you 89 times or
8 are they 89 separate emails?

9 MS. CHAIRMHAIC: Sometimes they're chains; sometimes
10 they're separate. I don't know how she does it.

11 THE COURT: Here's the bigger question. Does she
12 change your responses when she sends them? Because that's the
13 problem I have. They're not faulting her sending an email and
14 then maybe changing her mind and sending it a little bit later
15 with an added sentence to make something clear. What's being
16 shown to me in the emails that I've been asked to compare are
17 additions and subtractions from other people, and that's the
18 thing that I would think even her idiosyncratic email process
19 couldn't describe.

20 Are you suggesting to me that I should examine or
21 explore as an explanation for why these emails exist two
22 different ways that it's because of this accretive email
23 practice?

24 MS. CHAIRMHAIC: From my own personal experience, I
25 respond to Robyn's emails, and sometimes my responses get

JAMHABRO

1 repetitive with line sentences here and there because she
2 demands responses. But I certainly have sent many responsive
3 emails to her which say substantially the same thing, with a
4 line or two difference.

5 THE COURT: Let me understand this: If, indeed, it's
6 an email string, so something that is sent, almost variations
7 on a theme, sent six times. I would expect there to be six
8 versions of it that Ms. Abraham would have and six versions of
9 it that the recipient would have. What I have is I've got one
10 and one on each side, and they're different. I therefore can't
11 understand or I don't find easy an explanation that it's
12 because she was resending an email over and over again. But
13 you tell me.

14 MS. CHAIRMHAIC: I wish I had the ability to go into
15 her emails and print out all of the emails that she has and see
16 the pattern of day by day, but it's a huge task, and she did
17 not have the funds to show that level of her emails to Larry
18 Daniel. She gave him what she had.

19 THE COURT: Yes, which is why his expert report is of
20 limited utility to me.

21 MS. CHAIRMHAIC: Correct.

22 THE COURT: It just tells me that I shouldn't,
23 basically, worry my pretty little head about the ones that are
24 complete fabrications because that's too speculative to believe
25 that they're complete fabrications, and may be that is the

JAMHABRO

1 case. What I have, though, is there has to be -- and this is
2 the problem that I have with your opposition, a big problem
3 that I have -- there has to be an explanation for how these
4 things exist as they do. And if the explanation is a GoDaddy
5 server crash, that doesn't explain how they exist on two -- in
6 two people's files in different formats. If the answer is it's
7 an accretive process where there are 20 versions of the email
8 sent in a day, it doesn't explain why it's the counterparty's
9 email that's getting modified and not Ms. Abraham's. So that's
10 the problem I'm having.

11 How do you explain the additions to Ms. Diamond's
12 email?

13 MS. CHAIRMHAIC: Beverly Diamond is -- Beverly Diamond
14 is deceased, so I have not been able to see her inbox.

15 THE COURT: Of course. All right. Fair enough. I've
16 got other stuff here, and you've seen them. I'm not talking
17 about emails that you haven't seen.

18 MS. CHAIRMHAIC: Yes.

19 THE COURT: I need a working theory, other than
20 fabrication, that explains how they exist in two different
21 formats.

22 MS. CHAIRMHAIC: My understanding from working with
23 Robyn is that she sends a large volume of emails. She
24 encourages people to give a large volume of responses. They
25 may not all be the same, and her record preservation mechanism

JAMHABRO

1 has not been good. And as a result of that, we did recommend
2 that she voluntarily preclude those emails.

3 I do believe, also, that given that she has an
4 indefensible breach of contract, that she did a phenomenal job
5 on that contract to secure the interest of --

6 THE COURT: I don't know why that matters.

7 MS. CHAIRMHAIC: Because she didn't have a motive.

8 THE COURT: Let me be clear. I just had another case
9 entirely unrelated to yours where there was a sanctions motion
10 that involved the alteration of emails, localized hacks,
11 deactivated emails, and there as well the issues on which the
12 fabricated emails had any meaning or pertained to were really
13 collateral issues. So there was a really interesting question
14 that, of course, I did not -- I was not able to ask for a
15 number of reasons: Why bother gilding the lily? Why bother
16 lying about that stuff? She may have a fantastic contract
17 breach claim. I'm not going to say indefensible. I don't
18 know. I haven't gotten to the trial yet. But I have these
19 emails and they're different, and I'm trying to understand
20 that.

21 It doesn't matter to me at all that it's on a
22 collateral matter if, indeed, they were fabricated. So put to
23 the side how awesome her claim is and tell me why these emails
24 were not fabricated.

25 MS. CHAIRMHAIC: My understanding from talking to

JAMHABRO

1 Robyn and asking her to explain it, as you're asking me to
2 explain it now, is that --

3 THE COURT: I presume this wasn't the first time
4 you've been asked to explain this, but go ahead.

5 MS. CHAIRMHAIC: No, it's not.

6 -- was that defendants found something in her past,
7 and they built on it as a seed. There are anomalies in her
8 emails that could not be explained.

9 THE COURT: And you're saying -- are they the
10 fabricators?

11 MS. CHAIRMHAIC: It was my client's position that they
12 potentially recalled emails which would make them vanish from
13 her inbox, which is one of the reasons why they didn't exist
14 anymore.

15 THE COURT: You're anticipating my next question,
16 which is the fourth argument for why these things aren't as bad
17 as I think they are, is that this idea of recalling and
18 deleting, and I want to understand that argument better because
19 it really is made in only the most cursory way.

20 Are you suggesting that they recalled emails in 2014
21 or after the litigation hold in this case or today or something
22 else?

23 MS. CHAIRMHAIC: Well, I asked Larry Daniel how these
24 emails did not exist anymore, and he said: Well, the easiest
25 way would be that they just got deleted, you can archive them,

JAMHABRO

1 they can get deleted in another folder, you may get filters on
2 it that could get deleted, you could delete it yourself by
3 accident, or they could be recalled by the other side.

4 Why I thought that was of interest is that the
5 defendants in this case have been suing each other for fraud,
6 and I know they settled that case. It's *Leigh v. Honig*.

7 THE COURT: It was my case. I'm familiar with it. I
8 believe it's my case. Maybe they had another case that I
9 didn't -- gentlemen, is there another case other than the one
10 that was before me?

11 MR. BROADBENT: That's it, your Honor.

12 THE COURT: That's it. That settled before anything
13 really interesting happened. So, I mean, if you're asking me
14 to treat as definitive facts the pleadings of that case, I'm
15 not prepared to do it, and I don't know that there was any
16 discovery that substantiated any of the allegations there. But
17 please, keep going.

18 MS. CHAIRMHAIC: That's not a reflection on any of the
19 counsel in this case. It's just a reflection on it is as
20 possible that Robyn deleted emails as it is that they recalled
21 emails. Again, with such a huge volume of emails that -- they
22 had more of an interest in their claim that Robyn doctored
23 emails than Robyn did to actually doctor emails. She can make
24 out her case without the emails. They don't have a defense
25 without this theory of doctoring. And I understand that the

JAMHABRO

1 evidence is that they've built a very good case.

2 THE COURT: All right. I saw in Mr. Daniels' rebuttal
3 report what he says is: "I also requested the subject emails
4 in the original electronic format. They had either been
5 accidentally deleted or recalled." Now, please understand,
6 accidentally deleted or recalled, to me, doesn't have the same
7 sense of malevolence that you were just suggesting. You're
8 saying they weren't accidentally deleted or recalled. They
9 were recalled by the other side in order to make the claims
10 they now make. I just want to understand, because that's not
11 what his report says.

12 MS. CHAIRMHAIC: OK. I believe that the argument may
13 have come from the need for a defense to let's just get this
14 case kicked out in a sanctions motion. I believe that Martha
15 Wasserman had testified at her deposition that she had lost
16 most, if not all, of her emails. I believe that you can send
17 bad emails and want to get them taken out of your inbox. There
18 could be many reasons for them to do that. But I think that
19 the theory of falsifying emails was latched onto as a golden
20 ticket to get out of this case.

21 THE COURT: I see. I thought I understood that the
22 defense had the challenged emails in a native format. So at
23 least the stuff on there -- perhaps I'm mistaken. I'll ask the
24 folks at the back table promptly. But I thought the point was
25 one of the reasons they felt confident that the modifications

JAMHABRO

1 weren't coming from their side was that they had the emails in
2 original format with the metadata, and therefore they knew what
3 it said. And it was their inability to test them, again, to
4 test or discern the metadata in Ms. Abraham's PDF version, that
5 brought about these sanctions motion. Did I misperceive the
6 facts?

7 MS. CHAIRMHAIC: My understanding was that those were
8 similar emails but different emails. And, again, that goes to
9 Robyn's email practice in that if you look at my emails with
10 Robyn, you will see that there's a lot of them which look
11 almost the same, but there's lines here and there that are
12 different, and that goes for me and her. She demands a lot of
13 responses.

14 THE COURT: Yes. Now I'm sure you're not making
15 yourself an advocate and witness at the same time.

16 MS. CHAIRMHAIC: Right. I apologize, your Honor.

17 THE COURT: No, I understand. I don't want to run
18 afoul of any professional responsibility issues. We have
19 enough issues in this case without implicating those.

20 MS. CHAIRMHAIC: Thank you.

21 THE COURT: All right. There's a reference in
22 Ms. Abraham's affidavit to a computer used from 2014 to 2018.
23 I'm looking specifically at paragraph 18, and I can show it to
24 you if you are interested, although that means you're going to
25 have to see my handwritten annotations. I thought there was a

JAMHABRO

1 computer that was damaged in 2014. Am I correct?

2 MS. CHAIRMHAIC: My understanding from Steven
3 Bardfield was that there was at least two computers that were
4 damaged.

5 THE COURT: I've never heard about a second computer
6 being damaged. I mean, you're now telling me that. Let me
7 look again at what he wrote to me: "There was a Sony VAIO
8 laptop in or about September 2014." I don't know that he
9 ever represented -- has he represented to me that he worked on
10 another computer? Do I have that in this record?

11 MS. CHAIRMHAIC: Yes, it should be in the record. I
12 specifically recall a conversation with him saying that: You
13 retrieved the data. Where is it? We need the data. I said:
14 How many computers did you work on for her? And he said there
15 were at least two, and there were two Sony VAIOs.

16 THE COURT: OK. But one of them we know had the
17 unfortunate airline incident.

18 MS. CHAIRMHAIC: Yes.

19 THE COURT: What happened to the other one?

20 MS. CHAIRMHAIC: He did not tell me.

21 THE COURT: Did you ask him?

22 MS. CHAIRMHAIC: I did. He said it was damaged. He
23 did not say how. He wouldn't have known. He just saw a
24 damaged computer.

25 THE COURT: Is Ms. Abraham the unluckiest VAIO owner

JAMHABRO

1 on the planet that she has two laptop computers that, in the
2 course of this litigation, were damaged beyond repair?

3 MS. CHAIRMHAIC: Sony VAIO discontinued that brand.

4 THE COURT: OK. I think you're getting my point. It
5 was a little more rhetorical.

6 MS. CHAIRMHAIC: Right.

7 THE COURT: I'm amazed you didn't try to substantiate
8 it with a declaration from him that indeed there were two
9 computers. They were both damaged beyond repair. I only have
10 one referenced here.

11 MS. CHAIRMHAIC: He gave me the affidavit that he was
12 willing to give me, but he confirmed with me when I was
13 pestering him for the black box, he said there was at least
14 two.

15 THE COURT: Yes, that's the affidavit he wasn't
16 willing to give to you, and maybe I should draw something from
17 that.

18 All right. In your papers you indicated that I should
19 not credit Mr. Nguyen's affidavit, number one, because he was
20 not an expert and, number two, because it wasn't a sworn
21 statement.

22 I'm hoping that you're backing away from the latter
23 because I thought it was a sworn statement. Are you?

24 MS. CHAIRMHAIC: I am backing away from the latter
25 because he did say that it was stated upon penalty of perjury

JAMHABRO

1 even though it wasn't notarized.

2 THE COURT: Yes. I would have accepted that here, so
3 I don't think that's an issue.

4 Do you still believe that he is not competent to speak
5 about the topics on which he spoke?

6 MS. CHAIRMHAIC: I didn't see an extensive educational
7 background in IT from him. I saw that he was a police officer
8 who worked in domestic violence type of cases out in Texas up
9 until six years before he reinvented himself as an expert.

10 THE COURT: Should I be wary of folks involved in
11 domestic violence cases? I'm not sure why that matters to
12 anything.

13 MS. CHAIRMHAIC: I'm just saying he was a police
14 officer, and he went from earning like \$60,000 a year to \$325
15 an hour, which, if he worked full-time hours, that would be
16 over half a million dollars a year as an expert witness.

17 THE COURT: Every morning he wakes up and wishes that
18 he worked full-time as an expert witness. I don't think he is,
19 but that's for a different day.

20 So you think I should give less credit to it?

21 MS. CHAIRMHAIC: I think that Larry Daniel has a
22 stronger background.

23 THE COURT: But he only speaks to three documents.

24 MS. CHAIRMHAIC: Right, which were to explain the
25 anomalies, because with funds limited -- he charged a thousand

JAMHABRO

1 dollars, and he -- I said, you know, why are there these
2 anomalies in the emails? Were they fabricated from whole
3 cloth? And he said: No, this is just a different setting.
4 You print it in conversational setting. This is -- you can
5 manually change that. That's common practice.

6 THE COURT: Sure.

7 MS. CHAIRMHAIC: He explained those satisfactorily
8 enough for us to say, OK. So she's not --

9 THE COURT: Yes.

10 MS. CHAIRMHAIC: -- a criminal.

11 THE COURT: Of course, in Mr. Nguyen's response, he
12 certainly seems to at least take issue with some of his
13 statements. It would have been better to have a more detailed
14 response from Mr. Daniel, especially because he's addressing --
15 even if I were to spot you the three that he addresses, that
16 leaves me ten I still have to consider.

17 But let me please do this: I'd like to take a turn
18 with the folks at the back table, if you don't mind having a
19 pause in your questioning for now.

20 MS. CHAIRMHAIC: Thank you, your Honor.

21 THE COURT: All right. Thank you.

22 Mr. Broadbent, to begin, am I correct it's 13 emails
23 that we're talking about, yes?

24 MR. BROADBENT: Yes.

25 THE COURT: There were 33 PDFs that were given to you.

JAMHABRO

1 How many non-PDFs were given to you by Ms. Abraham?

2 MR. BROADBENT: Emails that were produced not in PDF
3 format?

4 THE COURT: In native form, sir, yes.

5 MR. BROADBENT: It's in Mr. Nguyen's affidavit. I
6 don't know the number. I know it's significant.

7 THE COURT: That's fine. I'll pull it up. Thank you,
8 sir.

9 MR. BROADBENT: The email file type was 492.

10 THE COURT: Yes, 492 emails of 789 documents with a
11 PDF file extension. Fair enough.

12 We're only here today about the 13, correct?

13 MR. BROADBENT: Your Honor, if the 13 are proven to be
14 part of a fraud, the 33 are then also suspect because they
15 exhibit the same -- I'm sorry, your Honor.

16 THE COURT: No, this is -- again, I'm surprised that I
17 am surprised by my oral argument with the parties. I hope you
18 know I prepared for this. I'm surprised that you're suddenly
19 telling me that I should actually think about something other
20 than the things that you've asked me to think about. So I
21 don't know whether that means that, depending on how I decide
22 today's motion, you may decide to have a whole new sanctions
23 motion. I thought this was an easy question.

24 You're asking me to consider 13 emails, correct?

25 MR. BROADBENT: Yes.

JAMHABRO

1 THE COURT: OK. Fine. That's what we've got.

2 I think you heard me discuss with Ms. Chairmhaic the
3 various explanations that have been given for how these emails
4 ended up as they ended up. So if you don't mind reviewing that
5 with me, I'd like to do that.

6 You gave me information from GoDaddy indicating that
7 there was no damage that would have caused any loss of data,
8 correct? There were no outages?

9 MR. BROADBENT: The substance of your Honor's
10 statement is correct. It came from defendants Honig and
11 Wasserman.

12 THE COURT: Yes, OK.

13 MR. BROADBENT: But the substance is correct, there
14 was no record of any outages based on the information received
15 from GoDaddy.

16 THE COURT: But now, today, I've heard something -- a
17 variation on that which I didn't appreciate until the footnote
18 was called to my attention, and that was that what I should
19 have intuited is that, in fact, every day emails are lost,
20 things happen, and that there could be -- the fact that there
21 was no acknowledgment of lost emails does not mean that there
22 weren't lost emails. That's what I'm understanding today from
23 Ms. Chairmhaic's conversation and Mr. Daniels' conversation
24 with the GoDaddy personnel.

25 It may be, sir, that your subpoena did not know enough

JAMHABRO

1 to ask or maybe there was no one to -- I shouldn't blame you,
2 and I'm not blaming Mr. Sacks, but I just want to -- how would
3 you like me to reconcile what's been proffered by the defense,
4 which is the no outages, to what's been proffered by
5 plaintiff's counsel, which is that every day there are lost
6 emails, and it's just a fact of life and you're just not going
7 to know after two weeks?

8 MR. BROADBENT: Your Honor, I have two responses: The
9 first, the statement that you've just described, as you said,
10 came from plaintiff's counsel. To the extent it represents a
11 phone conversation with an unknown individual at GoDaddy,
12 there's no sworn testimony from any such person. There's no
13 affidavit from somebody at GoDaddy. At best we have secondhand
14 recollection of an unidentified person whose credentials we
15 don't know at GoDaddy.

16 But assume that that statement is correct for a
17 moment. It doesn't explain why these emails exist in only PDF
18 form. Some emails exist in native form and PDF form, and some
19 emails exist in native form only. If it is true that there was
20 some data lost after Ms. Abraham had already generated printed
21 copies in the form that we see here, then we would have emails
22 in that form for every single email that she produced because
23 such emails would have been generated, and then only the 13 of
24 the 33 would be missing. The fact is we only have focus on the
25 13. Those 13 don't appear in native format in her production.

JAMHABRO

1 Some of them do in some way or another in other parties'
2 production. But the loss of data that Ms. Abraham appears to
3 rely on wouldn't have been so targeted as to only cause her to
4 lose the natives of these particular emails.

5 Putting aside the other anomalies, the editing of an
6 email from Ms. Diamond or Ms. Wasserman, the missing quotes,
7 all of those things, it doesn't track that the server outage
8 would be so targeted. We should have PDF versions in this
9 format of everything and then only 13 missing natives, or we
10 should have none of this type of email because the explanation
11 is I printed these things in this format, which is itself
12 suspect. But GoDaddy's millions of losses every day don't come
13 in and say I'm going to grab these emails. There's no rhyme or
14 reason to the loss other than the fact that the plaintiff made
15 certain edits or changes or generated the emails. So even if
16 we can accept the explanation from Ms. Chairmhaic pursuant to a
17 phone call with some person, it still wouldn't explain a number
18 of the anomalies or the data loss itself.

19 THE COURT: Is there anything else -- see, because you
20 speak second, you've heard my questions already, so I'd rather
21 not re-ask them.

22 But on the GoDaddy topic, on the discussions that I
23 had with Ms. Chairmhaic regarding GoDaddy, is there anything
24 else you wish to offer in your defense or, I guess, in further
25 support of your sanctions motion? It's fine if the answer's

JAMHABRO

1 no. I want to make sure. I want to move on to another topic,
2 and I don't want to leave you with an undelivered argument.

3 MR. BROADBENT: No, your Honor. That's it on GoDaddy.

4 THE COURT: OK. The computers, the broken computer,
5 were you aware that there were two computers?

6 MR. BROADBENT: Your Honor, I made a note of that when
7 your Honor observed that. I recall there being two different
8 invoices from Mr. Bardfield but not assigned to different
9 computers. The plaintiff in her depositions explained the
10 various devices that she had over the last few years. She had
11 an iPad which she had had for four or five years. The list was
12 taken in 2019. So she had an iPad dating back to 2014,
13 multiple phones, a laptop computer she identified that got
14 crushed in the overhead bin. I don't recall her saying that
15 she had a second laptop during the same period of time or that
16 there was another laptop being destroyed. That said, it may
17 have been said in passing at some point, but it's not something
18 that I recall.

19 THE COURT: All right. But I would have thought --
20 not that I took this deposition, obviously, but if someone
21 says, I had a laptop computer and it was crushed, I might say,
22 Did you get a replacement for it? And if they said yes, I
23 might ask about that. It would be understandable that someone
24 having lost a laptop would not go the rest of their lives
25 without a laptop; that they'd find something else. So

JAMHABRO

1 shouldn't we have assumed that there would have been something
2 that would have -- that she would have bought something else?

3 MR. BROADBENT: Yes, and Mr. Lafayette, who was
4 questioning the plaintiff --

5 THE COURT: Throw him under the bus.

6 MR. BROADBENT: He decided to show up, so I have to
7 make reference to him.

8 THE COURT: I'm sure he appreciates that, yes.

9 MR. BROADBENT: I'm not repeating the entire content
10 of the deposition because we don't want to be here for the rest
11 of the day, but he did question the plaintiff about the various
12 devices and what happened here and what happened thereafter.

13 THE COURT: Did anyone ever ask to review or perform a
14 forensic examination on any laptop that Ms. Abraham might have
15 had in her possession?

16 MR. BROADBENT: We asked the plaintiff to produce the
17 documents. I don't recall -- I don't believe that we asked her
18 to give us the laptop for forensic examination, but again, she
19 had explained she no longer had the laptop on which those
20 emails would have resided.

21 THE COURT: So you're not disputing her statements
22 today that there are, in fact, two laptops, both of which met
23 unfortunate ends?

24 MR. BROADBENT: I don't know. That's the point. None
25 of this has been demonstrated to be true. She may say that. I

JAMHABRO

1 don't know if that's accurate. There's nobody here --
2 Mr. Bardfield isn't here to say these are the two laptops I
3 worked on, this happened, this happened.

4 THE COURT: Of course not. He speaks about one. He
5 doesn't speak about the other.

6 MR. BROADBENT: Right.

7 THE COURT: That's why the second laptop is all news
8 to me, but there is discussion about -- well, let me phrase it
9 this way: In order to test your hypothesis that Ms. Abraham
10 fabricated emails, it would have been useful to you to perform
11 a forensic examination of her laptop computer which, of course,
12 I didn't let you do, but did you even know prior to today that
13 there were two laptop computers, that both met unfortunate
14 ends -- and folks at the front table stop nodding -- that both
15 met unfortunate ends and were repaired, or not, by
16 Mr. Broadbent?

17 MR. BROADBENT: Your Honor, I don't recall if there
18 was a second laptop mentioned. I do now recall the very first
19 time -- the very first time we discussed this, the very thing
20 that Mr. Sacks asked for was a forensic examination because he
21 did not want to be forced to bring a motion for sanctions
22 without having done so.

23 THE COURT: I understand.

24 MR. BROADBENT: So I apologize for not remembering
25 that at first, but that request, although we did not make it at

JAMHABRO

1 the time this issue first arose, that was the nature of
2 Mr. Sacks' inquiry, whether he could, in fact, conduct such an
3 examination, whether the plaintiff would conduct such an
4 examination, to demonstrate why these things were happening.

5 THE COURT: All right. Another discussion that we've
6 had this afternoon involves Ms. Abraham's emailing protocols or
7 emailing habits. Am I correct that what you've produced in
8 this -- well, were there efforts undertaken by your firm to
9 remove duplicative documents?

10 MR. BROADBENT: As part of our production?

11 THE COURT: Indeed, sir.

12 MR. BROADBENT: Yes. If something was the same email
13 multiple times because it had been saved in a folder and then
14 another folder, we would have de-duped it.

15 THE COURT: De-duped it?

16 MR. BROADBENT: If it's literally identical, it has an
17 MD5 hash, that means it's the exact same file simply kept in
18 multiple places.

19 THE COURT: That's exactly -- you've anticipated my
20 question. So to the extent it was a difference, it was re-sent
21 at a different time or another sentence was added or something
22 else, it would not have been de-duped from your production?

23 MR. BROADBENT: Right, because it wouldn't be the
24 same. Even if it was the same to the naked eye, the computer
25 wouldn't understand it to be the same; therefore, it would have

JAMHABRO

1 been produced both ways.

2 THE COURT: I see. Ms. Chairmhaic brought up the fact
3 that Ms. Wasserman, in her deposition, acknowledged the loss of
4 certain emails. Were you at that deposition, sir?

5 MR. BROADBENT: I was, your Honor.

6 THE COURT: Do you have a recollection of what her
7 testimony was in that regard?

8 MR. BROADBENT: I recall Ms. Wasserman saying
9 something about no longer having certain emails. Whether she
10 lost them or how they were destroyed, I don't recall the detail
11 of that, but I do recall that Ms. Wasserman did not have or may
12 have been understood at that time not to have certain emails.
13 I do know following that deposition that Ms. Wasserman's
14 counsel went back and searched for additional emails, and I
15 believe did, in fact, make a further production. That may have
16 resolved the issue after the deposition.

17 THE COURT: All right. The question, which should not
18 surprise you, if Ms. Wasserman is able to lose emails, why is
19 Ms. Abraham not?

20 MR. BROADBENT: Because Ms. Wasserman has not come in
21 with fake copies and does not come in with emails that appeared
22 to be strange and contained edits that change an email which
23 was otherwise produced in its native format with the exact same
24 identifying information. The two most troubling emails, your
25 Honor, are the email from Ms. Diamond to Tom Bovino, a chain in

JAMHABRO

1 which the plaintiff is copied, but at no point is the plaintiff
2 sending an email in that chain. The change at the bottom
3 substitutes certain texts about Ms. Abraham's real estate
4 experience with the --

5 THE COURT: Celebration program in Florida.

6 MR. BROADBENT: Yes. And whether that's accurately
7 stated is unclear. At her deposition the plaintiff denied
8 having real estate experience, so I'm not sure the change was
9 to add that text. That email was produced in native format by
10 our client, Ms. Leigh, as well as the plaintiff herself with
11 the exact same sender, recipient, and time stamp. None of the
12 explanations that Ms. Abraham has given can explain how that
13 happened. Nothing. The same is true for the deletion at the
14 end of an email sent by Ms. Wasserman. They're time stamped
15 the same time. It was an email from Ms. Wasserman and not the
16 plaintiff.

17 Ms. Wasserman did, in fact, produce a copy of the
18 email, and the missing text is a postscript advising the
19 plaintiff in 2013 that she would need to put up an advance,
20 which, if your Honor will recall, the demand for an advance
21 formed the basis of part of Ms. Abraham's claim that Mr. Honig
22 was extorting her and that the Leigh defendant had in some way
23 done Ms. Abraham wrong by asking her for an advance at the time
24 she claimed that she had Mr. Smith and Sir Trevor Nunn.

25 These emails have no explanation. It has nothing to

JAMHABRO

1 do with the plaintiff's email habits. They do not come from
2 her. It doesn't go to the loss of data. We have the other
3 emails from other parties. It cannot go to the loss of the
4 computer, same reason. We have the actual email from other
5 parties. Each one of the plaintiff's explanation will never,
6 will never, address those two anomalies.

7 On that basis alone, I think, your Honor, there's
8 grounds for sanctions. But the remainder of the emails, the
9 technical problems as Ms. Chairmhaic explained them are kind of
10 like a Jenga tower. At some point you pull all the
11 explanations out, and the thing comes down. There's no
12 unifying theory. There's a bounce around from emails -- maybe
13 it was a change in the settings, maybe I lost the documents,
14 maybe you lost the documents. But under threat of sanctions on
15 dismissal of her case for \$250 million against our client, I
16 would think Ms. Abraham would do everything in her power to
17 come up with some explanation. And at most we have a guess in
18 each case, and no guess that explains changes to emails
19 produced in native format by Ms. Abraham and the other parties,
20 and no guess that will explain how all of this happened in the
21 first instance.

22 I think I'm now ten miles from your Honor's question,
23 so I will stop till you ask the next one.

24 THE COURT: That's a wise move.

25 I didn't appreciate until preparing for this argument

JAMHABRO

1 the sort of later -- the latest claim, which at least for me it
2 was the latest claim, which is perhaps emails were recalled and
3 deleted by the folks at the defense table. Not the lawyers,
4 obviously, but your clients. Did you want to be heard on that
5 issue? Can you exclude the possibility?

6 MR. BROADBENT: Can I absolutely exclude that at any
7 point Ms. Wasserman or another party recalled an email that she
8 sent? I cannot.

9 THE COURT: I'll let you focus on your clients, maybe
10 not Mr. Sacks' clients.

11 MR. BROADBENT: I turn to Ms. Wasserman because none
12 of the emails that were alleged would have been recalled, none
13 of the fraudulent emails, were sent by Ms. Leigh or Mr. Leigh.
14 So that's why I'm turning to Ms. Wasserman, your Honor.

15 THE COURT: OK.

16 MR. BROADBENT: Is it theoretically possible that at
17 some point Ms. Wasserman recalled an email? Yes, but again,
18 that would not -- the theory seems to be that somehow, now
19 realizing that an email was bad for her, Ms. Wasserman was able
20 to go back and recall the email as it was sent in 2014. I'm
21 not sure how that would happen. Moreover, your Honor, in a
22 number of cases, these emails were copied to other parties.
23 Those people may have had those emails. I can continue to
24 guess as to why the recall theory doesn't work, but I'm just
25 guessing against a guess.

JAMHABRO

1 THE COURT: I won't make you do that, sir. Let me
2 then please change topics.

3 When Ms. Chairmhaic first got on the case, she very,
4 perhaps, prudently offered to just not use any of these emails.
5 And I bet if you asked her, she'd drop all 33 of the emails and
6 not the 13 rather than have another round of this. You want
7 more. You want more. You want sanctions.

8 MR. BROADBENT: Yes.

9 THE COURT: You want dismissal. You do understand
10 that, I mean, short of criminal contempt, which I don't think
11 anyone's asking for today, you're asking me to do the most
12 drastic thing I can do with a case, no?

13 MR. BROADBENT: I am, your Honor.

14 THE COURT: Why are you?

15 MR. BROADBENT: Because the fraud that Ms. Abraham
16 perpetrated on the court is extensive. She has yet to take
17 responsibility for that. She has offered no explanation for
18 why or how any of it happened that will hold water. And the
19 fraud has carried us this far and has impacted the parties'
20 ability to present their defense, to develop theories of the
21 case, and to determine how to proceed. For example, a number
22 of the emails involving Ms. Wasserman -- and I'm reluctant to
23 turn to Ms. Wasserman again, but this is important, your
24 Honor -- to the extent the plaintiff could use emails to show
25 that Ms. Wasserman had agreed to a production with Ms. Abraham,

JAMHABRO

1 that could, in theory, give Ms. Abraham two out of three votes
2 which she could then turn to argue would give her the right to
3 stage "La Mancha." We disagree that the emails would give her
4 that, but that would be her theory.

5 THE COURT: I thought I understood from something that
6 was sent to me in recent days that plaintiffs are not worried
7 about these emails at all because Mr. Honig's going to testify
8 and substantiate her claims. I don't know that to be the case.
9 Maybe Mr. Sacks wants to weigh in on that point, but that's
10 what I was told, was I not?

11 MR. BROADBENT: Your Honor, you were told something
12 along those lines. Mr. Honig is not here to explain why these
13 emails are not important. And having been caught engaged in
14 the conduct, for Ms. Abraham to say, well, these emails aren't
15 very important, I won't use them at the trial, doesn't excuse
16 the fact that she did use them to impact our defenses and our
17 theory of the case, the way we approach the case.

18 Up until the point at which this issue was discovered,
19 what we saw, your Honor, were multiple emails involving
20 Ms. Wasserman in which the plaintiff and Ms. Wasserman had
21 discussions that made no sense to us but that we had to try to
22 understand in figuring out how to approach the case. Did
23 Ms. Wasserman explain the need for an advance? Did she not?
24 Did she agree to do something, as the plaintiff was able to
25 cut-and-paste emails to purport to show, or did she not so

JAMHABRO

1 agree?

2 Furthermore, your Honor, we have been here for two
3 years as your Honor, I am sure, well knows, and we are only now
4 on the verge of summary judgment and trial, which is when these
5 emails would need to be excluded. But for the entire remainder
6 of the case, they mattered. They were understood to be
7 genuine, authentic emails according to the
8 plaintiff's testimony, whether we disagreed with her or not,
9 whether we believed they were fraudulent or not. Up until this
10 point, and possibly thereafter if your Honor denies the motion
11 or doesn't conclude that they were fraudulent, we'll still have
12 to accept, even if they are not used, that they were not
13 fraudulent.

14 So using them to carry us this far and cause us to
15 approach the case in some way, I believe, does require
16 dismissal, and that's consistent with the sanctions that have
17 been granted in prior cases. The fraud is so pervasive, so
18 extensive, and so unapologetically directed at the parties,
19 whether or not the document shows up in court is irrelevant.

20 Mr. Sacks was hesitant to bring the motion in the
21 first instance. We were hesitant to join it, your Honor,
22 because the results are extreme. But at this point, having
23 reviewed everything, having been here for so long, we do
24 believe that's the only appropriate sanction, whether or not
25 Ms. Abraham has agreed to withdraw the emails and not present

JAMHABRO

1 them in trial.

2 THE COURT: Sir, I do want to get to Ms. Chairmhaic in
3 a moment, but I do want to ask you a few more questions.

4 One of the things that has been suggested by your
5 adversary is that there really isn't a need to make up these
6 emails. You heard me refer to it earlier as the lily-gilding
7 argument. That she's got enough evidence; she doesn't need to
8 make this stuff up because it's collateral to her claims. I
9 appreciate from some of your prior comments that you may
10 disagree with that, and I think your reply suggests that you
11 do, but it's not as though she fabricated the contract that is
12 at the heart of this case and said, Ahh, here it is. I've been
13 looking for it all along, or the power of attorney that no one
14 can seem to find. So one could argue that these emails are on
15 the periphery.

16 Even if I find them to have been fraudulently created,
17 do they merit the very extreme sanction of dismissal?

18 MR. BROADBENT: Well, the point I was just explaining
19 to your Honor about the two-thirds issue, that is essential to
20 the matter.

21 THE COURT: OK.

22 MR. BROADBENT: Whether Ms. Wasserman may have agreed
23 to something would give Ms. Abraham, in her mind, certain
24 rights. She sought to enforce the agreement just against us,
25 that's true, but had Ms. Wasserman agreed to something, as the

JAMHABRO

1 cut-and-paste emails or the other emails purport to show, then
2 that would create a right that Ms. Abraham wouldn't otherwise
3 have and that she would have two-third vote, especially after
4 the realization that there was no power of attorney giving
5 Mr. Leigh control over the Darion interest, which was the
6 original theory, as your Honor will recall, that Mr. Leigh
7 could sign on behalf of himself and on behalf of Darion, giving
8 him the right to control two-thirds. That theory, being
9 unsupported, no evidence of that power of attorney appearing,
10 that increased the need on the plaintiff to have some evidence
11 that Ms. Wasserman agreed.

12 I can't explain to your Honor why, even if this was
13 gilding the lily -- and I obviously disagree, but I won't get
14 into the merits -- that's not a reason that the plaintiff
15 wouldn't engage in the conduct. She could have thought to
16 strengthen her case, even if she believed she would win, to
17 force certain parties into a settlement; could have simply
18 sought to make it more difficult. I think it's the same reason
19 why somebody might, having engaged in extensive financial
20 fraud, not hang up their hat, go home, and live somewhere in
21 their mansion in the Hamptons, Your Honor.

22 THE COURT: Yes, I'm not sure I understand your
23 argument.

24 MR. BROADBENT: My point is this: Just because
25 someone has made a lot of money or succeeded at something, it's

JAMHABRO

1 not a reason for them to just suddenly stop and say, I'm not
2 going to try and have a better case or I'm not going to go
3 further. Perhaps if the evidence of the fraud wasn't so
4 strong, I could see the explanation of why would she create
5 these emails. Having no explanation for emails that are
6 identical in form except for added text, whether or not she
7 argues now that there was no reason to do that, there's no
8 explanation for how that happened. Her motivation, although
9 relevant, can't be explained by, well, I have a good case;
10 therefore, I wouldn't do this.

11 I want to turn briefly to the email involving
12 Ms. Diamond because the text that Ms. Abraham added to the
13 bottom of the email with Ms. Diamond gives credence to the
14 theory, otherwise unsupported, that the plaintiff was drawn
15 into some preexisting negotiation between Mr. Leigh and Beverly
16 Diamond through Mr. Leigh's representative, Tom Bovino. We set
17 this forth in our memorandum, in our initial memorandum, your
18 Honor, but I'll just briefly summarize it.

19 The email traffic leading up to a meeting between
20 Ms. Abraham and Mr. Leigh in January is primarily between
21 Ms. Wasserman and Ms. Abraham. In October of 2013, Ms. Abraham
22 sends an email to Ms. Wasserman referencing the Jackson
23 Twenty-One real estate development in central New Jersey,
24 saying something to the effect of -- and I can read it, your
25 Honor, but the point is this might be the quickest way to

JAMHABRO

1 Mitch's heart. Thereafter, your Honor, Beverly Diamond shows
2 up communicating with Tom Bovino, Beverly Diamond being
3 Ms. Abraham's friend, possibly her cousin. It's unclear.
4 There's no preexisting, as far as we can tell, relationship
5 between Ms. Diamond, Mr. Bovino, and Mr. Leigh. The reason
6 based on the traffic, other than the altered email from
7 Ms. Diamond, to contact Mr. Bovino is to try and, as eventually
8 did happen, sneak in through the back door to discuss "La
9 Mancha" with Mr. Leigh.

10 The plaintiff testified at her deposition on this
11 issue saying, well, they -- referencing, I assume, Mr. Bovino
12 and Ms. Diamond -- they thought I would be helpful because of
13 my experience with Celebration in Florida. That gives the
14 impression that Ms. Abraham was a passive actor, which is the
15 furthest thing from the truth. But other than her testimony,
16 there was no support for that issue. The email in which she
17 added the idea that Beverly Diamond suggests bringing in Robyn
18 because of her experience is the proof that Ms. Abraham would
19 need to show that she did not engage in that improper conduct
20 in contacting Mr. Leigh; that is, if she was a passive actor
21 and she did not seek out Mr. Leigh, did not engage in the
22 relationship with him, did not breach that fiduciary duty.
23 There was no support for that theory and, in fact, the emails
24 show otherwise. The emails that Ms. Abraham changed -- and
25 again, this is one of the emails we have in native format, so

JAMHABRO

1 we know that it was altered -- that is the only document that
2 would give credence to the idea that Ms. Abraham was simply
3 brought into this because she knows something about Celebration
4 in Florida.

5 So it's one example, your Honor, but it is an
6 important one. Although our overarching theory is each of
7 these emails, whether Ms. Abraham thinks she has a good case,
8 still impacted the way we approached the litigation. That
9 particular change created a basis for an argument that did not
10 otherwise exist and, in fact, would have been refuted by the
11 other arguments.

12 THE COURT: Sir, at the beginning in my housekeeping
13 discussions, I discussed a topic that I didn't think was going
14 to be discussed, and then Ms. Chairmhaic explained why she
15 believed it needed to be discussed. If you want to be heard on
16 the issue of the Florida litigations, I will hear from you. If
17 you wish not to be heard on the issues, I will not hear from
18 you.

19 MR. BROADBENT: Your Honor, our only view is this: We
20 think the Florida litigation is irrelevant. We think the
21 suggestion that the Akerman firm or this firm decided to bring
22 this motion on the basis of the prior cases is without -- it's
23 offensive to us, your Honor. We think it's inaccurate, and
24 this has, in our view, no role to play in this issue.

25 That said, as your Honor indicated, it appeared that

JAMHABRO

1 the plaintiff was asking you to pick and choose or to decide
2 that parties who were found to be truthful had, in fact, lied.
3 So to the extent your Honor chose to consider it, it has to be
4 considered in its entirety. That is, the only record in that
5 litigation is that Ms. Abraham was found to have engaged in
6 that conduct. We don't think your Honor should consider that,
7 but if the plaintiff presses it and if your Honor does decide
8 to do so, that's what the record shows, and we think the whole
9 picture should be considered.

10 THE COURT: Sir, Mr. Sacks, I think more than you
11 wanted sanctions predicated on an attorney contact issue. Do
12 you wish to be heard on that point or is that not something
13 you're pursuing?

14 MR. BROADBENT: No, we didn't raise that issue, your
15 Honor.

16 THE COURT: I didn't think you did, so I'm not going
17 to discuss it with you then.

18 All right. You may sit down, sir. Thank you.

19 Mr. Sacks, since you're here, beyond why Mr. Honig's
20 name was cited to me in recent days or weeks, I am presuming,
21 sir, that Mr. Honig has nothing to add to this particular
22 motion that I am addressing. That maybe I'll get to hear from
23 him at trial, but I don't need to think about him at all in
24 thinking about this motion.

25 MR. SACKS: That's correct, in my view, your Honor.

JAMHABRO

1 THE COURT: All right. That's what I needed to know.
2 Thank you.

3 Ms. Chairmhaic, let me please hear from you in reply.

4 MS. CHAIRMHAIC: Firstly, I wanted to say that when I
5 said that about the Florida litigation planting a seed, at no
6 time have I ever known Mr. Sacks to be unethical in any of
7 these dealings whatsoever. It was I believe that the Florida
8 litigation planted a seed that perhaps Robyn had engaged in
9 certain conduct which made them go looking for things, and when
10 they went looking for things, they found the anomalies in the
11 emails, which do look bad on cursory review, until you know the
12 sheer volume of emails that Robyn generates and the volume of
13 responses that she elicits.

14 One of the issues that Mr. Broadbent brought up was
15 the emails between Beverly Diamond and Tom Bovino. Abby Leigh
16 was not copied on those emails, but Robyn was bcc'd on them and
17 similar with a lot of communications between industry
18 professionals. There was, from my understanding, more than one
19 email between these parties, which might explain why some had
20 words in them which others did not.

21 I'd also note that Abby Leigh is talking about
22 problems in emails which are not relevant to Abby Leigh herself
23 and/or to the estate's claim that Mitch Leigh gave a contract
24 to Robyn and they entered into the contract. At no point in
25 time has anybody said that that was not a valid contract or

JAMHABRO

1 that Mitch Leigh did not sign it. He signed it. He held
2 himself out as having the authority to enter into it.

3 With regards to whether he had that authority or not,
4 some of that is in the transcripts that says that there was a
5 two-third share. We don't need the emails to make that out,
6 but some of that is also in prior litigations that the "Man of
7 La Mancha," Joe Darion and Mitch Leigh and Wasserman, they were
8 always fighting with each other. In London they had been known
9 as the warring men of La Mancha.

10 THE COURT: Yes, and there was the case before Judge
11 Leval, I believe, the prior case before Judge Leval, if I'm not
12 misremembering.

13 MS. CHAIRMHAIC: Right, right.

14 THE COURT: But I don't know what that matters to this
15 litigation.

16 MS. CHAIRMHAIC: I think it matters with regard to how
17 they structured their decision-making and whether Joe Darion
18 did follow through what Mitch Leigh said and whether Mitch
19 Leigh had the authority to enter into it. Again, it goes down
20 to the motive, did Robyn have a motive to gild the lily or
21 could this just be that people looked for her to be fabricating
22 stuff and saw these emails and put one beside the other, didn't
23 recognize her pattern of email habits, and there could be two
24 emails in one day substantially similar with different text?
25 The explanation is Robyn's email habits.

JAMHABRO

1 THE COURT: That she modified other emails, that's the
2 point.

3 MS. CHAIRMHAIC: No, no.

4 THE COURT: Stop interrupting me.

5 This is the thing you don't seem to understand. I
6 don't care if she modified her own statements. That doesn't
7 bother me at all. I care that things are added to other
8 people's purported statements and that the native format
9 versions of these emails do not have this information. That's
10 what concerns me. So, again, I don't see how her email
11 idiosyncrasies go to the issue of why other people's statements
12 are changed.

13 MS. CHAIRMHAIC: I believe that goes to her emails
14 elicit responses, and those responses could be substantially
15 similar but slightly different as well. Again, because it she
16 has not been able to produce the live versions of those emails,
17 despite our best efforts to chase it down, we did recommend to
18 her and she accepted responsibility for not maintaining them.
19 She accepted responsibility and she said, yes, you can tell the
20 Court that I won't use those 13 emails. I won't use the 33
21 emails. I don't need any of them.

22 THE COURT: But stop that, because that's not the
23 issue. The issue isn't whether she needs the emails; the issue
24 is did she fabricate them?

25 Are you telling me right now she forswears, she says

JAMHABRO

1 she did not in any way modify any of the 13 emails that are
2 before me? I want to hear that. I don't want to hear an
3 explanation for how it is this came to be different. I want
4 you to tell me. I want her to tell me that she didn't modify
5 any of them, because I want to make a finding later on, and I
6 want to be able -- I don't want to make it on your ruminations
7 about what might have been. You're telling me she did not
8 modify it?

9 MS. CHAIRMHAIC: I have asked her every single day,
10 and she has said that she did not modify them. I picked up the
11 phone and I called Kent Yalowitz two or three times, and he
12 said: Robyn will go to her grave saying that she did not
13 modify or doctor email.

14 THE COURT: May I speak to your client?

15 MS. CHAIRMHAIC: Yes, absolutely.

16 THE COURT: Ms. Abraham, you know the 13 emails at
17 issue here, yes?

18 MS. ABRAHAM: Yes.

19 THE COURT: You can see there are differences among
20 certain emails that, matched up next to each other, they are
21 different?

22 MS. ABRAHAM: I understand, your Honor.

23 THE COURT: You've seen that in some cases text has
24 been added and text has been removed. Do you agree?

25 MS. ABRAHAM: I see what they provided. So, yes, I

JAMHABRO

1 agree.

2 THE COURT: You are telling me that at no time did you
3 ever modify or cause anyone else to modify any of those emails?

4 MS. ABRAHAM: At no time did I modify or cause anyone
5 else to modify any email at any time ever.

6 THE COURT: All right. Thank you.

7 Ms. Chairmhaic, there were other things you wanted to
8 say. Please, I'm going to ask you just to pause a second. I'm
9 getting an emergency in another case, so please excuse me.

10 (Pause)

11 THE COURT: Ms. Chairmhaic, is there anything else you
12 wish to add? It may be that my discussions with your client
13 have brought you to a natural summing up point, but I'll hear
14 from you.

15 MS. CHAIRMHAIC: I would like to, in just a couple of
16 sentences, say that when Mitch Leigh saw Robyn's potential and
17 contracted with her, they had a dying "Man of La Mancha"
18 production that nobody wanted to touch. The only way to bring
19 that back was to attach A-list talent, and Robyn was able to
20 accomplish in six months what none of them could do in
21 25 years.

22 THE COURT: But, Ms. Chairmhaic, that has nothing to
23 do with these issues. It has nothing to do with the issues of
24 whether documents were modified or not, and I know --

25 MS. CHAIRMHAIC: It goes to --

JAMHABRO

1 THE COURT: No.

2 MS. CHAIRMHAIC: -- motive.

3 THE COURT: No, it doesn't. You will tell me -- I
4 know, because I've read what you gave me, that this is what you
5 keep telling me about the strength of her claims and the
6 tremendous work she did in this regard. It doesn't help me to
7 resolve the issues as to why these emails exist in two formats.

8 MS. CHAIRMHAIC: Again, my understanding is that it
9 boils down to the sheer volume of emails she sends and the
10 volume of responses she elicits, and I would note that in this
11 case, going through the deposition transcripts, we have Lisa
12 Maldonado who testifies to destroying and shredding documents.
13 She was the executive assistant.

14 THE COURT: Ms. Chairmhaic, did you bring a sanctions
15 motion?

16 MS. CHAIRMHAIC: No, we did not.

17 THE COURT: Exactly. So stop that and focus on what
18 I'm asking you to focus on. I don't know why it's so difficult
19 for you to do that. You're trying to distract me. I'm not
20 going to be distracted.

21 MS. CHAIRMHAIC: The point of that was that Robyn
22 believes that it's possible that they recalled emails as well
23 as deleting and shredding documents, which Martha Wasserman
24 said that she couldn't find her emails. Lisa Maldonado,
25 the executive assistant for Mitch Leigh, said -- she testified

JAMHABRO

1 that she was destroying documents.

2 THE COURT: But there's been no forensic examination
3 to prove this. This is just a thought. There is no proof of
4 this.

5 MS. CHAIRMHAIC: There is sworn deposition testimony
6 saying that they were deleting emails and --

7 THE COURT: That they recalled her emails?

8 MS. CHAIRMHAIC: That they were deleting documents and
9 that they did not -- they no longer had certain emails in their
10 folders.

11 THE COURT: Yes, I'm aware of that testimony. My
12 point remains, you're making the argument now that she believes
13 they recalled emails so that she wouldn't have them. Is that
14 not the point?

15 MS. CHAIRMHAIC: The point was that when we asked
16 Larry Daniel: How did this happen? This looks really bad, and
17 he said: Oh, she either deleted them, archived them, deleted
18 it accidentally, or they could have been recalled, and he gave
19 his explanations for how this could have happened. I have a
20 client who's telling me every single day that she did not
21 doctor or modify emails, and I wanted to find out the reason.
22 We called the best of the best, what we thought was, forensic
23 guy to give us an explanation. That's the explanation that he
24 gave. If she didn't delete emails or doctor emails, she's not
25 going to be able to explain what she didn't do.

JAMHABRO

1 THE COURT: Of course. All right.

2 MS. CHAIRMHAIC: So I really appreciate the time that
3 you've taken to allow her to have her day in court and to
4 explain, as best as she can, a very difficult situation which
5 has potentially professional and criminal and dispositive
6 effects on this case. And there's a reason why I'm here today,
7 because nobody would touch the case until we could get past
8 this, if we can get past it, and I have spoken with a potential
9 trial counsel who's in the papers with regards to that. So I'm
10 praying that we can get through today. She has taken
11 responsibility for not preserving the documents in their native
12 format, and she did voluntarily offer to preclude all of that.
13 So I do think that she is trying to go a little bit and take
14 responsibility for not preserving documents as she believes and
15 we believe that she should have.

16 THE COURT: OK.

17 MS. CHAIRMHAIC: Thank you, your Honor.

18 THE COURT: Thank you very much.

19 I'm going to step off the bench for either five
20 minutes, at which point I will be able to tell you that I
21 will make you call in for my decision or I'll have someone come
22 out and tell you it will be a little bit longer, and I'll give
23 you something tonight. If you need to stretch your legs or
24 take a minute --

25 MR. FIEBACH: Your Honor.

JAMHABRO

1 THE COURT: Mr. Fiebach, yes.

2 MR. FIEBACH: I'm not sure if it's relevant to the
3 decision that you'll make, but I just wanted to say that the
4 theory of Ms. Chairmhaic that the seeds were planted by the
5 Florida litigation are not true. We had conversations with
6 Mr. Sacks when he had discovered some of the email problems
7 before the Florida litigation was known, and it was actually
8 our firm doing some research on the plaintiff that came up with
9 the fact that the Florida litigation existed, and then
10 thereafter we got some of the documents from the court. But I
11 say this as an officer of the court, from the timing
12 standpoint, the theory is wrong.

13 THE COURT: All right. Thank you. I'll be back soon.
14 Thank you.

15 (Recess)

16 THE COURT: You can be seated. I thought it best to
17 give you a decision this evening rather than have you wait
18 around on pins and needles, and I also thought that I don't
19 know that anything would be any more thoughtful. It would be
20 equally as correct. There may be some better verbiage, but I
21 think I should just do it.

22 I want to begin with something I think we should all
23 think about for a moment. There were a lot of very serious
24 allegations coming from different fronts, from different
25 parties in this case, and I thought that the allegations of

JAMHABRO

1 misconduct by plaintiff that the defense raised were extremely
2 serious, and I actually thought that they were somewhat sullied
3 or undercut by reference to what I consider to be unrelated
4 events and possibly unrelated injustices of several decades
5 ago. That is why when which began this matter, I thought it
6 best just not to consider that and to just remove it from my
7 thoughts, but the parties have asked me to consider it, and so
8 therefore I consider it.

9 On the issue of the events of 30 years ago in Florida,
10 to this day I don't know what happened in Florida, and for this
11 reason I have not allowed the credibility findings in that
12 other case to influence the decisions that I make about
13 Ms. Abraham's credibility in this matter. If what happened in
14 that case is true, it's absolutely awful and inexcusable. If
15 what happened was false and fabricated, it is also awful and
16 inexcusable, but I want to make clear that I do not credit for
17 one instant the argument that somehow defense counsel seized on
18 this incident of decades ago and then used it as a springboard
19 for the arguments that they are raising.

20 In addition to really overstating the matter, I think
21 I do have difficulty harmonizing the idea that counsel have
22 acted ethically when counsel have seized upon this issue to
23 just malign Ms. Abraham. I just don't think both things can
24 exist. The whole argument, which I'm smiling at because I find
25 it to be ridiculous, overlooks the point that there are emails

JAMHABRO

1 that exist in two versions. For the most part, I've got
2 examples in native format and then I've got a contrary version
3 in a PDF format, and I think it grossly understates the
4 seriousness of the inquiry that I've been making this afternoon
5 to suggest that somehow they were fabricated to get back at
6 plaintiff for something that happened decades ago.

7 The issue that I have had, the issue that I've tried
8 to come to terms with in this hearing is that there has to be
9 an explanation for why it is these things exist in two formats.
10 I don't want people's ruminations. I don't want maybe this and
11 maybe that. I do not want attorney *ipse dixit*. I want
12 answers.

13 And for that, I looked at the documents myself, and I
14 considered the competing reports of the expert witnesses in
15 this case. Mr. Nguyen, I see no serious challenge to his
16 ability to make the determinations that he makes. I do think
17 he is knowledgeable to the extent that he is knowledgeable.
18 What I noted was that he offered to me cogent explanations that
19 really have not effectively been rebutted. He's offered me a
20 theory, a narrative, a way that these documents can be
21 understood given the strange typographical and other
22 conventions that appear on them, and a lot of what he says is
23 borne out by the documents themselves.

24 Now, Mr. Daniel, on the other hand, I wrote a note to
25 myself that I found his report to be half-baked in the sense

JAMHABRO

1 that he only looked at three documents and basically just said:
2 No, no, Failla, that's speculative. He does nothing. He
3 doesn't provide or doesn't sufficiently provide a counter
4 explanation. He just throws out reasons why something may
5 happen, but he really doesn't address -- and in fairness to
6 him, he wasn't engaged or retained to address in any real deep,
7 meaningful way -- what's going on with these documents. I
8 found his explanations to be largely rebutted by Mr. Nguyen.
9 And actually, from my perspective, he really only focused on
10 three documents. I find that Mr. Nguyen's explanation for how
11 these documents have those strange either orientations or
12 quotation marks, or whatnot, I find his explanations to be more
13 likely, more plausible than those of Mr. Daniel. But even if I
14 put them to the side, I've got other documents that just can't
15 be explained away in this manner, and that's why today I was
16 focusing on the theories that have been offered to me to
17 explain why, in many cases, I have two documents with the same
18 time stamp and different words on it.

19 So here, I'm going through the theories with you now.
20 There is the GoDaddy theory. This was the original theory. It
21 was the only theory that I was given at the beginning of this
22 case. And what has been shown to me today is that there is
23 some conflict, but nothing dispositive, for the plaintiff at
24 least. There are these phantom outages that affect certain
25 documents, and Mr. Daniel doesn't really make the point that

JAMHABRO

1 Ms. Chairmhaic made about frequent, unexplained,
2 only-kept-for-two-weeks outages. So I don't find this to be a
3 sufficient rebuttal of the defendants' argument that GoDaddy is
4 not an explanation for these variances.

5 So then there's the broken computer explanation.
6 Ms. Chairmhaic today very, very thoughtfully indicated that
7 this was an instance of Ms. Abraham accepting responsibility,
8 but, to my mind, only to a degree. I didn't note until today
9 that there were two computers. No one has gotten the
10 technician to admit to having the same problems with both
11 computers being out of commission or being unable to be used.
12 So I find this as well unsuccessful and unsatisfying as an
13 explanation for what happened with those emails.

14 In Ms. Chairmhaic's briefing, there was the third
15 explanation, which was idiosyncratic email practices. I find
16 this to be actually, and with no disrespect, less plausible
17 than the GoDaddy and the broken computer theories because it
18 does not explain the counterparty edits. Why is it that --
19 Ms. Abraham can have a ton of emails. I will accept the
20 proposition that she sends many emails a day, but I don't see
21 what she's -- how her email habits end up influencing others,
22 especially with the same time stamp to have different text.

23 Also, I haven't been shown these multiple emails or
24 these multiple responses, and so it's a rumination. It's not
25 been proven to me successfully or adequately in this

JAMHABRO

1 proceeding, and it absolutely does not explain the edits on
2 which I have focused this afternoon.

3 So, now, dovetailing with that theory is a theory
4 that, in fact, it was the defense witnesses or someone who was
5 recalling and deleting emails. Now, I concede that there were
6 defense witnesses who testified about deleting emails, but even
7 that does not explain the recall component or how it is that I
8 have two different versions, oftentimes with the same time
9 stamp but with different text.

10 The strongest argument for the defendants is that I
11 have a bunch of exhibits that I can't explain other than by
12 finding that somebody modified them; that they were altered.
13 And ultimately, I conclude that they were altered by
14 Ms. Abraham.

15 Today I noted that counsel was very careful,
16 plaintiff's counsel, in how she phrased her arguments on this
17 point. That it was Ms. Abraham's position, that Ms. Abraham
18 would go to her grave believing, and everything was done in
19 terms of Ms. Abraham's beliefs. So I went straight to the
20 source, and I asked Ms. Abraham as plainly as I could. She
21 answered, and I do not believe her, and I believe that she
22 perjured herself before me today. And that echoed something
23 that Mr. Broadbent said to me when he referred to certain of
24 these theories or certain of these presentations as
25 unapologetic. They are. At some point in this process,

JAMHABRO

1 Ms. Abraham should just admit that these documents are doctored
2 and walk away from it, but even now before me she doubles and
3 triples and quadruples down. That's what I'm left with. I'm
4 left with the fact that these things are fabricated and that I
5 believe that she fabricated them.

6 There was some discussion earlier today about motive,
7 and I'm not sure that I need to make a specific finding on
8 motive. I neither accept nor refute the idea that she has a
9 strong case without them. I just don't know. Therefore, I
10 don't think that I can find that she had no motive to fabricate
11 these emails. It may be that she wished to shore up what she
12 perceived to be deficiencies in the case. It may be that she
13 was, as I used the expression earlier, gilding the lily. It
14 doesn't matter. To improve her position in this litigation,
15 she altered the documents. She submitted them in discovery.
16 She submitted them to me, at least one of them to me. And even
17 now, in all of these proceedings, she refuses to accept or to
18 admit that they were fabricated.

19 I've viewed the expression "doubling down," and I
20 think that's what's going on here because there were many
21 opportunities for us not to be where we are today, and yet here
22 we are. In fact, it's actually gotten worse because she has
23 perjured herself to me today, and I find -- I believe *Dunnigan*
24 requires certain findings about the statement, its falsity, its
25 materiality, and it being made with a culpable state. I'm

JAMHABRO

1 making those findings here today.

2 As the parties know from the submissions, I have the
3 ability to impose sanctions under Rule 37. I have the ability
4 to impose them under my inherent powers. I have the ability to
5 impose them for fraud on the court.

6 The defendants, not surprisingly, have asked for
7 dismissal, and for the past long time, let's say 35 minutes,
8 I've been thinking about that. I ultimately find that
9 dismissal is too severe, and I'm not going to dismiss the case,
10 but I am going to impose sanctions.

11 I respect and take to heart what Mr. Broadbent said
12 about the manner in which the Leigh defendants were injured by
13 the fraud and by the possible spoliation in this case. They
14 went down dark alleyways investigating emails and legal issues
15 that just didn't need to be done because the emails were
16 fabricated. They wasted their time, and they were unable to
17 strategize the case in the way they wanted to. Conversely,
18 they are precluded at this stage from looking at the
19 plaintiff's native format emails to aid their case. They are
20 hamstrung in that regard as well.

21 So having thought about what is the appropriate set of
22 sanctions for this case, I'm going to give them to you now.
23 All 33 PDF documents are excluded from trial. That was easy.
24 Ms. Chairmhaic was going to agree to that anyway.

25 More importantly, Ms. Abraham will pay all of the lead

JAMHABRO

1 defendant's costs incurred as a result of the fabrication of
2 emails. Now, I'm going to give defense counsel an appropriate
3 amount of time to figure out what those costs are. In my
4 mind -- and this was done just quite quickly in my robing
5 room -- it would include the time that they spent investigating
6 the provenance or the format of the documents, comparing it
7 with other documents, reviewing their own clients' email
8 accounts and electronic information to see if there were
9 counterparties to these documents, the forensic expenses that
10 they incurred that Leigh paid for -- I'm not sure how much that
11 is at this point -- any legal research or writing that had to
12 be undertaken because of misdirections caused by the
13 fabrication of documents, the preparation of the papers and the
14 preparation for oral argument in this hearing today and any
15 other hearings or proceedings that can be fairly traced to the
16 fabrication of documents.

17 Now, I've thought about giving a spoliation
18 instruction to the jury and requesting an adverse -- or
19 allowing them to make, if they wish to, an adverse inference.
20 On this record, I do not feel comfortable giving a spoliation
21 instruction because I do not know that I have enough of a
22 record to find a culpable state of mind at the time the
23 computers were given away, which is, to my mind, the issue on
24 spoliation, but I'm allowing that to be renewed if the record
25 and the law supports it.

JAMHABRO

1 What I do think is appropriate is that I think an
2 adverse instruction -- or perhaps it comes out this way:
3 Ms. Abraham can be crossed at trial on the fact that a federal
4 judge has found that she perjured herself in a court
5 proceeding, because she did. I am not today thinking about
6 professional responsibility referrals or criminal case
7 referrals. I think that's just too much for today, but that
8 perjury has consequences, and the consequence may end up at
9 this trial.

10 So those are the sanctions that I am imposing. I
11 believe that, under the factors that I may consider under my
12 inherent powers and under Rule 37, I can impose those. Again,
13 if somebody wants me to cite cases, I will, but at the
14 beginning of this proceeding, that was forsworn.

15 I am expecting that someone is going to get a
16 transcript of this proceeding. I won't order you to do so.
17 From my perspective, my work on this motion is done. I will
18 allow -- Mr. Broadbent, I'm going to task you with something,
19 because I am. Please arrange for a schedule to produce to me a
20 submission on fees and costs, and please consult with
21 Ms. Chairmhaic at this time so that you can present something
22 to me that has time for opposition submission. I don't
23 anticipate oral argument on that. I think I would just do that
24 on the papers. But that is the remaining issue on sanctions.

25 That's all I have. Does anyone have anything to bring

JAMHABRO

1 to my attention? Ms. Chairmhaic?

2 MS. CHAIRMHAIC: Thank you, your Honor.

3 THE COURT: Thank you, ma'am.

4 Mr. Broadbent, I'm looking at you, same question,
5 anything else?

6 MR. BROADBENT: No, your Honor.

7 THE COURT: We're adjourned. I thank you very much
8 for staying.

9 (Adjourned)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25